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MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-460

DONALD TROISE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MIAMI REVIEW — 371-4853 — 377-3721

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The Petitioner, Donald Troise, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on August 10, 1973, affirming the judgment of conviction previously entered aganist him in the United States District Court for the Southern District of Florida.

OPINIONS BELOW

There was no opinion in the District Court and its judgment is not reported. The judgment of the Court of Appeals for the Fifth Circuit was announced in an opinion which has not yet been reported. That opinion is made into an Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals affirming the judgment of conviction and sentence was entered on August 10, 1973. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code, Section 1245(1).

QUESTION PRESENTED

WHETHER THE PETITIONER WAS DENIED HIS FIFTH AMENDMENT GUARANTEES BY VIRTUE OF THE TRIAL JUDGE'S REFUSAL TO GRANT A MISTRIAL UPON THE TESTIMONY OF A GOVERNMENT AGENT THAT THE PETITIONER REMAINED SILENT IN THE FACE OF A QUESTION ASKED OF HIM IN A CUSTODIAL SETTING PRIOR TO BEING GIVEN HIS MIRANDA WARNINGS?

CONSTITUTIONAL PROVISIONS

Fifth Amendment to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a

presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT

The facts are fairly stated in the opinion of the Court of Appeals for the Fifth Circuit. However, several facts require emphasis. The petitioner was convicted by a jury of a violation of 21 USC Sect. 841(a)(I) to wit: possessing with intent to distribute 613 pounds of marijuana. The prosecution culminated many weeks of governmental dealings with informants and surveillance of the petitioner and his co-defendants.

The subject marijuana was seized by the U.S. Customs agents after stopping an automobile towing a boat and trailer on U.S. 1 near the Tavernier area of the Florida Keys. The testimony in question arose when, the agents, with their weapons drawn, approached the petitioner and his co-defendants, and asked several questions designed to elicit incriminating answers. Specifically on page 94 of the trial transcript, the following transpired:

> Q. (by Prosecutor Craig) After you observed the occupants of the car get out, what did you next have occasion to observe?

> **A. (by Agent Thompson) Well, at this moment I, after everyone had got out, I asked who owned the boat, who owned the car, who owned the trailer. No one replied. (emphasis supplied)**
>
> **Mr. Gold (petitioner's trial counsel): Judge, I am going to object to that remark. . . .**

Thereafter, the trial Judge sustained the objection and ordered the remark stricken from the record. The instructions given to the jury by the trial Judge is set out in its entirety in footnote #2 on page 6, of the decision entered by the U.S. Court of Appeals, Fifth Circuit.

After further proceedings, the petitioner was found guilty and sentenced to two and one-half years imprisonment.

REASONS FOR GRANTING THE WRIT

There can be no doubt that the trial Judge was correct in ruling the Agent's aforementioned testimony inadmissible. It is well settled that a defendant's silence or failure to respond to an interrogator's question cannot be used at trial, for any purpose, against said defendant. Miranda v. Arizona, 384 U.S. 436 (1966); U.S. v. Mullings, 364 F.2d 173 (2nd Cir. 1966); Helton v. U.S., 221 F.2d 338 (5th Cir. 1955). Further, it is rudimentary that the Government must prove each and every element of a crime beyond and to the exclusion of every reasonable doubt. In the prosecution below one such element was that of guilty knowledge on the part of the petitioner.

The impermissible testimony bore a direct relationship to this element of the crime. The logical inference for the jurors to draw would be that since the petitioner knew that the marijuana was in the boat he would not state that he was the boat's owner. This testimony wrongfully aided the Government in proving this element of the crime.

Notwithstanding the Judge's instructions, it is unlikely that the jurors, in considering whether or not the petitioner had knowledge of the subject marijuana contained in the boat, could blot from their minds the fact that when asked who owned the boat, the petitioner did not respond. One would be hard-pressed to convincingly assert that the jurors were unaffected and unswayed by the subject testimony of Agent Thompson. This dilemma was recognized long ago by this Honorable Court in **Hopt v. Utah,** 120 U.S. 430, 438, 7 S.Ct. 614, wherein it was stated:

> But yet there may be instances where such a strong impression has been made upon the minds of the jury by illegal and improper testimony, that its subsequent withdrawal will not remove the effect caused by its admission, and in that case the general objection may avail on appeal or writ of error.

The Circuits are in general agreement that the basic concept to be followed is that when there is an erroneous admission of evidence or testimony, it may be cured by withdrawing the evidence from the jury's consideration and instructing the jury to disregard it. **U.S. v. Plants,** 472 F.2d 829 (1st Cir. 1973); **U.S. v. Semensohn,** 421 F.2d 1206 (2nd Cir. 1970); **U.S. v. Levinson,** 405 F.2d 971, 988

(6th Cir. 1968); **Wiley v. U.S.**, 257 F.2d 900 (8th Cir. 1958). However, the Circuits do vary in applying the exception to this general rule, that certain events or testimony which are inadmissible and impermissible cannot be cured by an instruction. It is for this reason that the instant Writ is sought. The various Circuits are in need of guidance in applying this exception which only this Honorable Court can provide.

The Second Circuit is adamant in its rulings that no inference of guilt can be drawn from an accused's silence at the time of arrest. **U.S. v. Mullings, supra; U.S. v. Semensohn, supra.** The circumstances in the instant case reveal that the petitioner was prejudiced by Agent Thompson's remark not only by the inference of guilt that could be drawn, but also that an essential element of the crime was shown to have existed by inadmissible testimony. Certainly the error in the case at bar is no more susceptible to a curative instruction than that contained in **Mullings** and **Semensohn.**

CONCLUSION

There is fundamental unfairness when the Government is allowed to profit from inadmissible testimony tending to establish an essential element of the crime charged. The petitioner asserts that simultaneously his Fifth Amendment right against self-incrimination was impinged and also by virtue of the subject testimony he was denied a fair and impartial trial. Petitioner's freedom should not hinge on conjecture as to the probable impact on the jurors of testimony so patently prejudicial.

Respectfully submitted,

/s/ Melvyn Kessler

MELVYN KESSLER
1699 Coral Way, Suite 300
Miami, Florida
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Petition for Writ of Certiorari has been mailed this 15th day of October, 1973, to Robert H. Bork, Solicitor General, Department of Justice, Washington, D.C., and Lawrence Craig, Assistant U.S. Attorney, 300 Ainsley Building, Miami, Florida.

/s/ Melvyn Kessler

MELVYN KESSLER

ADDENDUM

The petitioner, DONALD TROISE, is presently a fugitive from justice stemming from his conviction upon which the instant appeal rests. Counsel for petitioner is familiar with this Honorable Court's holding in **Molinaro v. New Jersey**, 396 U.S., and files this petition in order to preserve and protect rights available to petitioner in future proceedings.

OPINION

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASE NO. 73-1017
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

DONALD TROISE,
Defendant-Appellant.

Before BROWN, Chief Judge, DYER and SIMPSON, Circuit Judges.

BROWN, Chief Judge: This appeal is taken from Appellant's conviction by a jury trial of possessing with intent to distribute 613 pounds of marijuana in violation of 21 U.S.C.A. Sec. 841(a)(1). Though Appellant raises three assignments of error, we consider only two worthy of discussion. These are that the court below erred in denying

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*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

Appellant's (i) motion to suppress evidence on grounds that the search and seizure violated his rights guaranteed by the Fourth Amendment and (ii) motion for mistrial based upon the prosecution's elicitation of impermissible and incurable statements from its witness during direct examination. Having carefully reviewed the record we find both to be without merit and thus affirm.

A brief statement of the facts will suffice. In early April of 1972 United States Customs agents were informed by a reliable source that contraband would be imported into the United States through the Tavernier area of the Florida Keys. The information provided was that a Boston whaler-type boat would sail to the Yucatan Peninsula, pick up the contraband and return to the United States in tow behind a larger vessel. Customs agents placed an address in Miami under surveillance where they observed several automobiles, included among them, a gold Oldsmobile convertible. On July 27, 1973, further information was received from another informant that the registration number on the small vessel used in the smuggling operation would be MS 10 HS. The Customs agents made an attempt to locate the vessel with this identification number and actually sighted it on more than one occasion. Shortly thereafter they received information that the Boston whaler had departed on the smuggling mission. On August 12, 1972, the United States Customs air detail sighted a Boston whaler-type boat whose description matched their information in tow behind a larger vessel on a course for Key West, Florida. The following day, Customs agents observed what appeared to be the same boat being towed behind a gold Oldsmobile convertible headed north on Highway U.S. 1. The Customs agents ordered the vehicle over to the side of the road at which time they testified there was a strong

odor of marijuana emanating from under the canvas covering the boat. A search revealed the presence of 613 pounds of marijuana in the cockpit area of the boat.

PROPRIETY OF THE DETENTION:

The United States District Judge below, after conducting an evidentiary hearing on the question of suppression, found the detention and the subsequent search and seizure to be justified under what has become known as a "border search." This term describes certain statutorially created and judicially recognized situations where the dictates of the Fourth Amendment are relaxed to allow warrantless searches, see McDaniel v. United States, 5 Cir., 1972, 463 F.2d 129; United States v. Wright, 5 Cir., 1973, 476 F.2d 1027; United States v. Thompson, 5 Cir., 1973, ____ F.2d ____ (No. 72-2690, March 29, 1973); United States v. DeLeon, 5 Cir., 1972, 462 F.2d 170; United States v. Maggard, 5 Cir., 1971, 451 F.2d 502; United States v. Hill, 5 Cir., 1970, 430 F.2d 129; United States v. Posada, 5 Cir., 1973, ____ F.2d ____ (No. 72-1800, April 13, 1973), the rationale being that on balance mild intrusions upon privacy sometimes must give way to the serious and legitimate interest of the government with respect to enforcing along thousands of miles of open border valid customs, immigration and related laws. These "border searches," however, have been limited to, and remain, a carefully defined class of cases. See Almeida-Sanchez v. United States, 1973, ____ U.S. ____, ____ S.Ct. ____, ____ L.Ed.2d ____ (No. 71-6278, June 21, 1973); United States v. Storm, 5 Cir., 1973, ____ F.2d ____ (No. 72-3138, June 22, 1973). Because we conclude from the record that Appellant's detention was supported by probable cause, we find it unnecessary to

reach the question of whether the search and seizure fell within the aegis of a "border search."[1]

Here the Customs agents had pieced together information from multiple informants that a gold Oldsmobile convertible and a blue and white Boston whaler-type vessel with the registration number MS 10 HS were going to be used in a scheme to illegally enter the country with contraband. The agents had consciously maintained a surveillance on the Miami address where they had observed the Oldsmobile convertible parked, initiated a search for the Boston whaler-type vessel and maintained air surveillance of the coastline around Key West. Upon sighting the Boston whaler in tow behind a larger vessel and heading for Key West, they began a surveillance of the Tavernier area of the Florida Keys, where they observed the boat in tow behind the gold Oldsmobile convertible headed north on U.S. 1. Viewing as we must the totality of the circumstances, we think the agent's prior knowledge of the vehicles and its occupants were easily sufficient to constitute probable cause for the belief that when the vehicle was stopped it carried contraband narcotics. Once stopped, of course, the record is clear that the agents were able to detect a strong odor of marijuana emanating from the vessel, given probable cause, the law is well settled that, because of the mobility of motor vehicles, the possibility of flight, and subsequent destruction of evidence, officers may search where they have reasonable cause to believe a crime has been committed. Chimel v. California, 1969, 395

[1]At the suppression hearing below the trial judge also found the existence of probable cause to support the search and seizure, but seemed to base his denial of the motion to suppress primarily on his finding that the search and seizure qualified as a "border search." Our holding merely affirms the finding of probable cause making it unnecessary for us to address the "border search" question.

U.S. 752, 89 S.Ct. 2034, ____ L.Ed.2d ____; Carroll v. United States, 1925, 267 U.S. 132, ____ S.Ct. ____, ____ L.Ed. ____.

DENIAL OF MISTRIAL:

On direct examination by the prosecution of the Customs agent who made the arrest the following dialogue transpired:

> Q. After you observed the occupants of the car get out, what did you next have occasion to observe?
>
> A. Well, at this moment, I after everyone had got out, I asked who owned the boat, who owned the car, who owned the trailer. No one replied.

An objection immediately followed, coupled with the lengthy admonition to the jury by the trial Judge to disregard the import of agent Thompson's response.[2]

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[2]The instruction to the jury was as follows:

Ladies and gentlemen, the last remark was not responsive to the question and it should not be considered by you at all. The answer about any conversations this man had with these two persons.

Some folks say it is impossible for jurors to strike something from their minds which has been discussed in the court. I can only tell you what you are doing is weighing evidence, deciding whether or not the Government has overcome the presumption of innocence by proof beyond every reasonable doubt.

Judges do this all day long and all week long, say, "I cannot consider this because it is inadmissible."

The question is, does the other evidence weigh so heavily to establish the charges beyond every reasonable doubt, so I will tell you not to consider it, the last statement made by this witness regarding some questions he asked people out at the scene.

It is Appellant's contention that the trial Judge's attempt at cautioning and instructing the jury was insufficient to cure the prejudicial effect the remark had on the minds of the jurors. It is argued that since one of the essential elements the government was required to prove was that of guilty knowledge, the jurors would infer that since Appellant knew what was in the boat he would not say that he was the owner. We are unpersuaded.

It has long been the settled rule in this Circuit that error in the admission of evidence under most circumstances may be cured by withdrawing the evidence from the jury's consideration and instructing the jury to disregard it. U.S. v. Pritchard, 5 Cir., 1969, 417 F.2d 327; Hill v. United States, 5 Cir., 1966, 363 F.2d 176; Conner v. U.S., 5 Cir., 1962, 322 F.2d 647, cert. denied, 1964, 377 U.S. 907, ____ S.Ct. ____, ____ L.Ed. ____; Fahning v. U.S., 5 Cir., 1962, 299 F.2d 579. While we recognize that there is an exception to this rule in cases where the remark is so highly prejudicial as to be incurable by the trial court's admonition, we don't view this as such a situation. See U.S. v. Kidd, 5 Cir., 1971, 446 F.2d 1385. Our reading of the context in which the impermissible testimony was elicited convinces us that agent Thompson's remark was inadvertent and not responsive to the question.[3]

After reviewing the totality of the testimony received, we cannot conclude that the contested statement, though impermissible, had such a prejudicial effect on the minds

[3]We find nothing in the record to support Appellant's argument that the response by agent Thompson was calculated to make a strong impression on the jury.

of the jury that it could not, and was not totally cured by the Judge's cautionary instruction.[4]

All of Appellant's assignments[5] of error are without merit.

AFFIRMED.

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[4]It is our opinion that, had the trial Judge further cautioned the jury to disregard any inferences that could have been drawn from the agent's statement, as Appellant argues he should have, it would only have served to draw further attention to the statement thus compounding the problem.

[5]Another assignment of error alleged by Appellant in this appeal challenged the trial Judge's instruction to the jury concerning actual and constructive possession. We conclude this contention to be without merit and decline discussion.

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The issue presented is whether the trial court should have declared a mistrial because of testimony, immediately excluded, that petitioner refused to identify himself to customs agents as the owner of a boat, later found to contain marijuana.

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of possession with intent to distribute 613 pounds of marijuana, in violation of 21 U.S.C. 841(a)(1). He was sentenced to two and one-half years' imprisonment. The court of appeals affirmed (Pet. App. I).

The facts are set forth in the opinion of the court of appeals (Pet. App. I). Briefly, they are as follows: Based on reliable information and surveillance, unchallenged here, U.S. Customs Agents stopped an automobile, which was towing a boat on a trailer. Smelling a strong odor of marijuana, the agents searched the boat and found marijuana.

During the prosecutor's direct examination of one of the customs agents, the following colloquy occurred (Pet. App. I 5):

> Q. After you observed the occupants of the car get out, what did you next have occasion to observe?
>
> A. Well, at this moment I, after everyone had got out, I asked who owned the boat, who owned the car, who owned the trailer. No one replied.

This was immediately followed by an objection which was sustained. The jury was instructed to disregard the agent's response (Pet. App. I 6, n. 2). Petitioner's contention that the court's caution and instruction were insufficient to cure the the prejudicial effect the remark had on the minds of the jurors was properly rejected in the opinion of the court of appeals, upon which we rely.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.

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[1] See also *Frazier* v. *Cupp*, 394 U.S. 731, where it was held that the court's limiting instructions were sufficient to protect defendant's rights. There the prosecutor summarized in his opening statement to the jury the expected testimony of a co-defendant who had pleaded guilty but decided later not to testify. The cases cited by petitioner (Pet. 5) are inapposite. *United States* v. *Mullings*, 364 F. 2d 173 (C.A. 2), did not involve the adequacy of a curative instruction, but merely the improper admission of highly prejudicial evidence to show that a statement, which had been taken in violation of the defendant's Fifth Amendment rights, was falsely exculpatory. *United States* v. *Semensohn*, 421 F. 2d 1206 (C.A. 2), was also a case in which no curative instruction was given regarding testimony that the defendant declined to answer questions when questioned by the F.B.I. (421 F. 2d at 1209-1210). That error combined with improper comment regarding petitioner's prior record—which was not rendered harmless by an inadequate curative instruction—required a reversal of the conviction.